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9
10 **UNITED STATES DISTRICT COURT**
11 **CENTRAL DISTRICT OF CALIFORNIA**

12 ROBERT BURNS and KRISTEN
13 BURNS,

14 Plaintiffs,

15 v.

16 HSBC BANK USA, NATIONAL
17 ASSOCIATION, AS TRUSTEE FOR
18 ACE SECURITIES CORP. HOME
19 EQUITY LOAN TRUST, SERIES 2004-
20 FM2 ASSET BACKED PASS-
21 THROUGH CERTIFICATES; OCWEN
22 LOAN SERVICING, LLC, a Delaware
23 Limited Liability Company; and DOES
24 1-10, inclusive,

25 Defendants.

CASE: EDCV 12-01748 JGB (OPx)

Assigned to Hon. Jesus G. Bernal

**PLAINTIFFS' OPPOSITION TO
DEFENDANTS' MOTION TO
DISMISS THE FIRST AMENDED
COMPLAINT; MEMORANDUM
OF POINTS AND AUTHORITIES
IN SUPPORT THEREOF**

Date: August 26, 2013

Time: 9:00 a.m.

Ctrm.: 1

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

Plaintiffs Robert Burns and Kristen Burns (hereinafter cumulatively referred to “Plaintiffs”) by and through their attorneys of record hereby oppose Motion to Dismiss Plaintiffs’ First Amended Complaint filed by Defendants HSBC Bank USA, National Association, as Trustee for ACE Securities Corp. Home Equity Loan Trust, Series 2004-FM2 Asset Backed Pass-Through Certificates and Ocwen Loan Servicing, LLC. This Opposition is based on Memorandum of Points and Authorities in support thereof, all the papers on file with the Court, and any arguments made by Plaintiffs’ counsel at the hearing currently scheduled for this matter.

DATED: August 05, 2013

THE ALBERTS FIRM

By: /Batkhand Zoljargal/
Jeremy J. Alberts
Batkhand Zoljargal,
Attorneys for Plaintiff,
Robert Burns and Kristen Burns

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Through the instant lawsuit, Plaintiffs Robert Burns and Kristen Burns (hereinafter cumulatively referred to as "Plaintiffs") will establish that HSBC Bank USA, National Association (hereinafter "HSBC Bank"), as Trustee for ACE Securities Corp. Home Equity Loan Trust, Series 2004-FM2 Asset Backed Pass-Through Certificates (hereinafter "Ace Securities Trust") (in its capacity as purported assignee of Plaintiff's Deed of Trust) is not their true creditor and as such has no legal, equitable, or pecuniary right in the debt obligation secured by the real property located at 970 S. Encina Avenue, Rialto, California 92376 (hereinafter "Property" or "Subject Property").

Plaintiffs have sufficiently pled both plausible factual allegations, as well as legal claims, to enable their Complaint to move forward. This is not the phase in litigation to weigh the merits of the case. In reviewing the sufficiency of the claims asserted, the issue is not whether plaintiffs will ultimately prevail, but whether the plaintiffs are entitled to offer evidence to support the claims asserted. *See Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

II. STATEMENT OF FACTS

Plaintiffs alleged in their First Amended Complaint (hereinafter "FAC") that on or around March 3, 2004, Plaintiffs herein executed a Note (hereinafter "Note") and Deed of Trust (hereinafter "Deed of Trust") in favor of the Fremont Investment and Loan (hereinafter "Fremont") and Mortgage Electronic Registration Systems (hereinafter "MERS") as a nominal beneficiary. FAC ¶ 17.

In the instant case, a first assignment (hereinafter "First Assignment") was executed and recorded in 2009. A second Assignment (hereinafter "Second Assignment") was executed and recorded on or about January 19, 2012. Defendants never notified Plaintiffs of this transfer according to 15 U.S.C. 1641(g). FAC ¶ 20.

1 Furthermore, MERS only had authority of a nominee. At the time MERS
2 executed the first assignment, Fremont was closed and under Federal Bankruptcy
3 protection. Plaintiffs alleged in their First Amended Complaint that Fremont never
4 instructed or authorized MERS to make the assignment and if MERS did, Plaintiffs
5 did not believe the transfer was disclosed to the bankruptcy court or trustee. FAC ¶
6 21.

7 As an additional attempt to correct deficiencies in the chain of title and in order
8 to effectuate a swift non-judicial foreclosure of Plaintiffs' home, Defendants
9 substituted the foreclosure trustee agreed upon in Plaintiffs' Deed of Trust for their
10 own trustee. Plaintiffs alleged, on information and belief, that Western Progressive,
11 LLC (hereinafter "Western Progressive") was either a wholly owned subsidiary of
12 HSBC Bank and/or Ocwen Loan Servicing, LLC (hereinafter "Ocwen"). By utilizing
13 a non-arm's length trustee, Defendants were able to accomplish the foreclosure
14 without any question as to the authenticity of title or the legality of the sale itself.
15 FAC ¶ 29.

16 Provision 24 of the Deed of Trust governs the substitution of trustee. It
17 provides in relevant part: "Lender, at its option, may from time to time appoint a
18 successor trustee to any Trustee appointed hereunder by an instrument executed and
19 acknowledged by Lender ... This procedure for substitution of trustee shall govern to
20 the exclusion of all other provisions for substitution." In violation of Provision 24,
21 and Cal. Civ. Code Section 2934(a), Fremont failed to file a valid Substitution of
22 Trustee, substituting Western Progressive as the new trustee. Any recorded
23 Substitution is void because it was not executed by Fremont, or their agents, but
24 instead by Defendants herein. These defendants were not the current "Lender" at the
25 time of the execution of the Substitution. HSBC Bank claims to have the power to
26 record the substitution but never had a valid assignment of the Deed of Trust.
27 Therefore, Western Progressive substituted in was not allowed to act as the trustee
28

1 under the Deed of Trust. Any substitutions recorded on title by the Defendants are
2 fraudulent, and the execution, filing, and recordation of the documents are for the
3 purpose of facilitating and aiding and abetting the illegal, deceptive, and unlawful
4 collection and attempts to collect on Plaintiffs' obligation. FAC ¶¶ 30-32.

5 Plaintiffs alleged in their First Amended Complaint that Defendants are
6 equitably estopped from foreclosing because they have unclean hands by virtue of
7 their actions in the origination and servicing of the Loan that underlies this case. FAC
8 ¶ 39.

9 Plaintiffs alleged that Western Progressive did not have standing to initiate a
10 foreclosure action against the Subject Property. Perhaps Fremont had standing to
11 foreclose but Fremont did not start foreclosure proceedings or even assisted in the
12 foreclosure process. In fact, Plaintiffs alleged that Fremont herein went out of
13 business before Defendants started foreclosure proceedings against Plaintiffs. FAC ¶
14 40.

15 Additionally, Plaintiffs' home was wrongfully foreclosed upon after Plaintiffs
16 received a valid loan modification from Defendant Ocwen's predecessor, Litton Loan
17 Servicing, LLC (hereinafter "Litton"). Pursuant to a loan modification offer from
18 Litton, Plaintiffs and Litton agreed to place a series of fees to be paid at the end of the
19 Loan. Upon buying the loan from Litton, and stepping into the shoes of Litton
20 regarding all of their rights and obligations to the Loan, Defendant Ocwen
21 immediately asked for the series of fees to be paid up front. Ocwen informed
22 Plaintiffs that any payment made would only go toward the fees, and the regular
23 payments would be considered late until the fees were paid. Ocwen violated the terms
24 of the loan modification offered by its predecessor in interest, accepted by Plaintiffs
25 and consummated by both parties. Ocwen's violation of its predecessor's promise
26 forced Plaintiffs into default. And then Ocwen immediately proceeded to default and
27 foreclosure, refusing to discuss or negotiate the matter with Plaintiffs. Ocwen
28

1 negligently and recklessly proceeded to foreclosure in violation of a binding and valid
 2 loan modification agreement that Plaintiffs had negotiated with Ocwen's predecessor,
 3 Litton, and made payments thereto. FAC ¶¶ 42-43.

4 Plaintiffs relied on HSBC Bank's and Ocwen's misrepresentations and have
 5 been damaged in the following ways: (1) Plaintiffs have been paying the wrong party
 6 for an undetermined amount of time and overpaid in interest that was overcalculated;
 7 (2) Plaintiffs have suffered damage to credit; (3) the title of Plaintiffs' home has been
 8 lost through wrongful foreclosure; (4) Plaintiffs are facing an imminent eviction from
 9 the Subject Property; (5) Plaintiffs have expended significant funds to cover the cost
 10 of attorneys' fees and related costs; (6) Plaintiffs' reputation has diminished in the
 11 community; and (7) multiple parties may seek to enforce their debt obligations
 12 against Plaintiffs. FAC ¶ 34.

13 Plaintiffs alleged in their First Amended Complaint that Plaintiffs' claims
 14 against Defendants should serve as a set off or be treated as a counterclaim against
 15 any sums owed to any defendant (assuming that any defendant had standing to collect
 16 payments). FAC ¶ 35.

17 **III. LEGAL ARGUMENT**

18 **A. STANDARD FOR DISMISSAL UNDER FEDERAL RULE OF CIVIL** 19 **PROCEDURE 12(b)(6)**

20 Motions to dismiss for failure to state a claim under Federal Rules of Civil
 21 Procedure, Rule 12(b)(6) are viewed with disfavor, and accordingly, dismissals for
 22 failure to state a claim are "rarely granted." *Gilligan v. Jamco Dev. Corp.*, 108 F.3d
 23 246, 249 (9th Cir. 1997). The standard for dismissal under Rule 12(b)(6) is a
 24 stringent one. "[A] complaint should not be dismissed for failure to state a claim
 25 unless it appears beyond doubt that the plaintiff can prove no set of facts in support of
 26 her claim which would entitle her to relief." *See Hartford Fire Ins. Co. v. California*,

1 509 U.S. 764, 811 (1993) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957);
 2 *Cervantes v. City of San Diego*, 5 F.3d 1273, 1274 (9th Cir. 1993) (emphasis added).

3 The purpose of a motion under Federal Rule 12(b)(6) is to test the formal
 4 sufficiency of the statement of the claim for relief in the complaint. *See Rutman Wine*
 5 *Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 738 (9th Cir. 1987). The complaint must
 6 be construed in the light most favorable to the nonmoving party and its allegations
 7 taken as true. *See Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d
 8 90 (1974). It is not a procedure for resolving a contest about the facts or the merits of
 9 the case. In reviewing the sufficiency of the complaint, the issue is not whether the
 10 plaintiff will ultimately prevail, but whether the Plaintiff is entitled to offer evidence
 11 to support the claims asserted. Furthermore, more recently, the U.S. Supreme Court
 12 has held that to survive a motion to dismiss, a complaint must contain sufficient
 13 factual matter, accepted as true, would "state a claim to relief that is plausible on its
 14 face." *See Bell Atlantic Corp. v. Twombly*, 55 US 544 (2007).

15 **B. PLAINTIFFS ARE NOT REQUIRED TO TENDER**

16 Tender is not required when the action attacks the validity of the underlying
 17 debt because the tender would constitute an affirmation of the debt. *Lana v. HSBC*
 18 *Bank, N.A.*, 2011 WL 6391584, 14-16 (Cal. App. 6 Dist. Dec. 21, 2011) (identifying
 19 four exceptions to the tender rule); *Sacchi*, No. CV 11-1658 AHM, 2011 WL
 20 2533029, at 9-10 (citing *Onofrio v. Rice*, 55 Cal. App. 4th 413,424 (1997)); *Stockton*
 21 *v. Newman*, 148Cal. App. 2d 558, 564 (1957); also *Vogan*, No. 2:11-CV-02098-JAM-
 22 KJN, 2011WL 5826016, 7-8 (The Court held that the tender requirement does not
 23 apply to this case because plaintiffs were challenging the beneficial interest held by
 24 the bank in the deed of trust, not the procedural sufficiency of the foreclosure itself.);
 25 *Foulkrod v. HSBC Bank Financial California Inc.*, No. CV 11-732-GHK (AJWx)
 26 (C.D. Cal. May31, 2011) ("...requiring plaintiff to tender the amount due on her loan
 27
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1 at this time would be illogical and inequitable given that he disputes that HSBC Bank
2 has any rights under the loan.").

3 Tender is also not required where a borrower has claims against the beneficiary
4 that would offset the amount due. *Lana*, 2011 WL 6391584, at 14. Plaintiffs alleged
5 in their First Amended Complaint that Plaintiffs' claims against Defendants should
6 serve as a set off or be treated as a counterclaim against any sums owed to any
7 defendant (assuming that any defendant had standing to collect payments). FAC ¶ 35.

8 The court in *Vogan*, recognizing that requiring tender would be inappropriate
9 in just such a case as this, explained that plaintiffs are not saying that the bank failed
10 to follow the letter of California's statutory foreclosure law; they are claiming that
11 the bank did not have standing to foreclose in the first place. Thus, relying on
12 *Onofrio*, requiring plaintiffs to tender the full amount of the indebtedness to an entity,
13 the bank, that was allegedly not the beneficiary to the deed of trust in order to protect
14 plaintiffs' interest in the property would be inequitable. *Vogan*, 2011 WL 5826016, at
15 7 (citing *Onofrio*, 55 Cal. App. 4th 413). Here, Plaintiffs also alleged in their First
16 Amended Complaint that US Bank is not the beneficiary under the Deed of Trust.
17 here are therefore not required to tender. Plaintiffs stated in their First Amended
18 Complaint that MERS only had authority of a nominee. At the time MERS executed
19 the first assignment, Fremont was closed and under Federal Bankruptcy protection.
20 FAC ¶ 21.

21 Finally, some courts have held that where a sale is void, rather than voidable,
22 tender is not required. *Tamburri v. Suntrust Mortg., Inc.*, 2011 WL 624472, at *4
23 (N.D. Cal. Dec. 15, 2011)(citations omitted). "The word void, in its strictest sense,
24 means that which has no force and effect." *Little v Cfs Service Corp.*, 188 Cal.App.
25 3d 1354. 1358 (1987) (citations and quotations omitted). For example, in *Dimock v.*
26 *Emerald Properties, LLC*, 81 Cal. App. 4th 868 (2000), the court found that the deed
27
28

1 was void, rather than merely voidable, where an authorized trustee conducted the
2 foreclosure sale. *Id.* at 876.

3 Here, Plaintiffs alleged in the First Amended Complaint that as an additional
4 attempt to correct deficiencies in the chain of title and in order to effectuate a swift
5 non-judicial foreclosure of Plaintiffs' home, Defendants substituted the foreclosure
6 trustee agreed upon in Plaintiffs' Deed of Trust for their own trustee. Plaintiffs
7 alleged, on information and belief, that Western Progressive was either a wholly
8 owned subsidiary of HSBC Bank and/or Ocwen. By utilizing a non-arm's length
9 trustee, Defendants were able to accomplish the foreclosure without any question as
10 to the authenticity of title or the legality of the sale itself. FAC ¶ 29.

11 Provision 24 of the Deed of Trust governs the substitution of trustee. It
12 provides in relevant part: "Lender, at its option, may from time to time appoint a
13 successor trustee to any Trustee appointed hereunder by an instrument executed and
14 acknowledged by Lender ... This procedure for substitution of trustee shall govern to
15 the exclusion of all other provisions for substitution." In violation of Provision 24,
16 and Cal. Civ. Code Section 2934(a), Fremont failed to file a valid Substitution of
17 Trustee, substituting Western Progressive as the new trustee. Any recorded
18 substitution is void because it was not executed by Fremont, or their agents, but
19 instead by Defendants herein. These Defendants were not the current "Lender" at the
20 time of the execution of the Substitution. HSBC Bank claims to have the power to
21 record the substitution but never had a valid assignment of the Deed of Trust.
22 Therefore, Western Progressive substituted in was not allowed to act as the trustee
23 under the Deed of Trust. Any substitutions recorded on title by the Defendants are
24 fraudulent, and the execution, filing, and recordation of the documents are for the
25 purpose of facilitating and aiding and abetting the illegal, deceptive, and unlawful
26 collection and attempts to collect on Plaintiffs' obligation. FAC ¶¶ 30-32.

27 Therefore, Plaintiffs are not required to tender.
28

1 **C. PLAINTIFFS ALLEGED SUFFICIENT FACTS TO STATE A CAUSE**
 2 **OF ACTION FOR NEGLIGENCE**

3 The elements of negligence are: (1) duty, (2) breach of duty, (3) proximate
 4 cause, and (4) damages. *Conroy v Regents of Univ. of Cal.*, 45 Cal. 4th 1244, 1250
 5 (2009).

6 A bank may be liable in negligence if it fails to discharge its contractual duties
 7 with reasonable care. *Das v. PHH, NA.*, 186 Cal. App. 4th 727, at 741 (2010) citing
 8 *Chazen v. Centennial Bank*, 61 Cal. App. 4th 532, 537 (1998). In California, the test
 9 for determining whether a financial institution owes a duty of care to a borrower
 10 “involves the balancing of various factors, among which are (1) the extent to which
 11 the transaction was intended to affect the plaintiff; (2) the foreseeability of harm to
 12 him, (3) the degree of certainty that the plaintiff suffered injury, (4) the closeness of
 13 the connection between defendant’s conduct and the injury suffered, (5) the moral
 14 blame attached to the defendant’s conduct, and (6) the policy of preventing future
 15 harm.” *Watkinson v. MortgageIT, Inc.*, 2010 WL 2196083, at *8 (S.D. Cal. June 1,
 16 2010)(internal citations and quotations omitted).

17 Here, Plaintiffs alleged in their First Amended Complaint that Plaintiffs’ home
 18 was wrongfully foreclosed upon after Plaintiffs received a valid loan modification
 19 from Defendant Ocwen's predecessor, Litton Loan Servicing, LLC (hereinafter
 20 "Litton"). Pursuant to a loan modification offer from Litton, Plaintiffs and Litton
 21 agreed to place a series of fees to be paid at the end of the Loan. Upon buying the
 22 loan from Litton, and stepping into the shoes of Litton regarding all of their rights and
 23 obligations to the Loan, Defendant Ocwen immediately asked for the series of fees to
 24 be paid up front. Ocwen informed Plaintiffs that any payment made would only go
 25 toward the fees, and the regular payments would be considered late until the fees
 26 were paid. Ocwen violated the terms of the loan modification offered by its
 27 predecessor in interest, accepted by Plaintiffs and consummated by both parties.
 28

1 Ocwen's violation of its predecessor's promise forced Plaintiffs into default. And
 2 then Ocwen immediately proceeded to default and foreclosure, refusing to discuss or
 3 negotiate the matter with Plaintiffs. Ocwen negligently and recklessly proceeded to
 4 foreclosure in violation of a binding and valid loan modification agreement that
 5 Plaintiffs had negotiated with Ocwen's predecessor, Litton, and made payments
 6 thereto. FAC ¶¶ 42-43.

7 A loan modification on Plaintiffs' Property (1) was intended to directly affect
 8 the Plaintiffs; (2) it was foreseeable that if such a valid loan modification was to be
 9 totally disregarded and a new modification demanding upfront fees was to be
 10 demanded, then Plaintiffs here would not be able to comply and lose their Property to
 11 foreclosure; (3) it is certain that Plaintiffs lost their Property to foreclosure; (4) the
 12 connection between Defendants' conduct and the foreclosure is very close; (5) the
 13 moral blame attached to the Defendant's conduct is enormous because it affected
 14 families to lose their homes; and (6) the policy of preventing future harm is prevalent
 15 in new federal and California laws (Homeowner's Bill of Rights, Cal. Civ. Code,
 16 Section 2923). Therefore, Defendants HSBC Bank and its agent, Ocwen, owed a duty
 17 of care to Plaintiffs.

18 Furthermore, "[a] lender may owe a duty of care sounding in negligence to a
 19 borrower when the lender's activities exceed those of a conventional lender. ..." *Osei*
 20 *v. Countrywide Home Loans*, 692 F.Supp.2d 1240, 1249 (2010). One such instance is
 21 when the lender goes, "...beyond its role as a silent lender and loan servicer to offer an
 22 opportunity to plaintiffs for loan modification and to engage with them concerning [a]
 23 trial period plan." *Ansanelli v. JP Morgan Chase Bank, N.A.*, 2011 WL 1134451, at 7
 24 (N.D. Cal. March 28, 2011).

25 Some courts have applied the above six-factor test to determine whether
 26 lending institutions handled loan modifications negligently. *See Yau v. Deutsche*
 27 *Bank Nat. Trust Co. Americas*, 2013 WL 2302438, at *3 (9th Cir. May 24,

1 2013)(citing *Jolley v. Chase Home Fin., LLC*, 213 Cal. App. 4th 872, 898-906
 2 (2013)). Some courts have found that engaging in loan modification negotiations goes
 3 beyond the domain of a usual money lender. *Ansanelli v. JP Morgan Chase Bank,*
 4 *N.A.*, 2011 WL 1134451, at 7 (N.D. Cal. March 28, 2011); *Robinson v. Bank of*
 5 *America*, 2012 WL 1932842, at *7 (N.D. Cal. May 29, 2012); *Garcia v. Ocwen Loan*
 6 *Servicing, LLC*, 2010 WL 1881098, at *3 (N.D. Cal. May 10, 2010)/

7 At very least, in contrast to other district courts, US District Court, Central
 8 District of California, has taken the position that the no-duty rule does not apply to
 9 servicers. *See, e.g., Juntilla v. JP Morgan Chase Bank, N.A.*, No. CV 11-7701,
 10 Docket No. 27, at 3-4 (February 2, 2012); *see also id.*, Docket No. 26. Obviously loan
 11 servicers must exercise some degree of care in their servicing activities, at least in
 12 connection with their collection of payment on the mortgage. Consequently, several
 13 court have determined that servicers do have such duties of care sufficient to maintain
 14 a claim for negligence against them. *See, e.g., Susilo v. HSBC Bank Bank, N.A.*, No.
 15 CV 11-1814 CAS, 2011 U.S. Dist. LEXIS 66567 (C.D. Cal. June 21, 2011); *see also*
 16 *Gardner v. Am. Home Mortg. Servicing, Inc.*, 691 F.Supp.2d 1192, 1199 (E.D. Cal.
 17 2010). Here, as in *Susilo*, Plaintiffs did allege that Defendants failed to comply with
 18 the terms of the Deed of Trust. Provision 24 of the Deed of Trust governs the
 19 substitution of trustee. It provides in relevant part: "Lender, at its option, may from
 20 time to time appoint a successor trustee to any Trustee appointed hereunder by an
 21 instrument executed and acknowledged by Lender ... This procedure for substitution
 22 of trustee shall govern to the exclusion of all other provisions for substitution." In
 23 violation of Provision 24, and Cal. Civ. Code Section 2934(a), Fremont failed to file a
 24 valid Substitution of Trustee, substituting Western Progressive as the new trustee.
 25 Any recorded Substitution is void because it was not executed by Fremont, or their
 26 agents, but instead by Defendants herein. These Defendants were not the current
 27 "Lender" at the time of the execution of the Substitution. HSBC Bank claims to have
 28

1 the power to record the substitution but never had a valid assignment of the Deed of
 2 Trust. Therefore, Western Progressive substituted in was not allowed to act as the
 3 trustee under the Deed of Trust. Any substitutions recorded on title by the Defendants
 4 are fraudulent, and the execution, filing, and recordation of the documents are for the
 5 purpose of facilitating and aiding and abetting the illegal, deceptive, and unlawful
 6 collection and attempts to collect on Plaintiffs' obligation. FAC ¶¶ 30-32.

7 Defendants HSBC Bank and Ocwen breached their duty failing to recognize a
 8 valid loan modification with Litton and making improper substitution of the trustee in
 9 violation of the Deed of Trust, forcing Plaintiffs' Property to foreclosure. The list of
 10 Plaintiffs' damages stated above.

11 Therefore, Plaintiff's cause of action for negligence is sufficient as to both
 12 Defendants HSBC Bank and Ocwen.

13 **D. PLAINTIFFS ALLEGED SUFFICIENT FACTS TO STATE A CAUSE**
 14 **OF ACTION FOR WRONGFUL FORECLOSURE**

15 There is no unqualified rule that a nonjudicial foreclosure sale is immune from
 16 attack. *Dock v. Emerald Properties, LLC* I, 81 Cal. App. 4th 868, 877 (2000)
 17 (plaintiff successfully challenges trustee sale on grounds that it was conducted by
 18 former trustee and the trustee at the time of the sale).

19 To state a claim for wrongful foreclosure, the plaintiff must please the
 20 following: "(1) the trustee or mortgagee caused an illegal, fraudulent, or willfully
 21 oppressive sale of real property pursuant to a power of sale in a mortgage or deed of
 22 trust; (2) the party attacking the sale (usually but not always the trustor or mortgagor)
 23 was prejudiced or harmed; and (3) in cases where the trustor or mortgagor challenges
 24 the sale, the trustor or mortgagor tendered the amount of the secured indebtedness or
 25 was excused from tendering." *Permito v. Wells Fargo Bank, N.A.*, 2012 WL
 26 1380322, *3 (N.D. Cal. Apr. 20, 2012) (quoting *Lona v. Citibank, N.A.*, 202 Cal.
 27 App. 4th 89, 104 (2011)).

1 Here, the tender requirement is fully discussed above. Plaintiffs alleged in their
 2 First Amended Complaint that MERS only had authority of a nominee. At the time
 3 MERS executed the first assignment, Fremont was closed and under Federal
 4 Bankruptcy protection. FAC ¶ 21. In addition, Defendants substituted the foreclosure
 5 trustee agreed upon in Plaintiffs' Deed of Trust for their own trustee. Plaintiffs
 6 alleged, on information and belief, that Western Progressive was either a wholly
 7 owned subsidiary of HSBC Bank and/or Ocwen. By utilizing a non-arm's length
 8 trustee, Defendants were able to accomplish the foreclosure without any question as
 9 to the authenticity of title or the legality of the sale itself. FAC ¶ 29. In violation of
 10 Provision 24, and Cal. Civ. Code Section 2934(a), Fremont failed to file a valid
 11 Substitution of Trustee, substituting Western Progressive as the new trustee. Any
 12 recorded Substitution is void because it was not executed by Fremont, or their agents,
 13 but instead by Defendants herein. These defendants were not the current "Lender" at
 14 the time of the execution of the Substitution. FAC ¶¶ 30-32.

15 In addition, Plaintiffs' home was wrongfully foreclosed upon after Plaintiffs
 16 received a valid loan modification from Defendant Ocwen's predecessor, Litton.
 17 Pursuant to a loan modification offer from Litton, Plaintiffs and Litton agreed to
 18 place a series of fees to be paid at the end of the Loan. Upon buying the loan from
 19 Litton, and stepping into the shoes of Litton regarding all of their rights and
 20 obligations to the Loan, Defendant Ocwen immediately asked for the series of fees to
 21 be paid up front. Ocwen informed Plaintiffs that any payment made would only go
 22 toward the fees, and the regular payments would be considered late until the fees
 23 were paid. Ocwen violated the terms of the loan modification offered by its
 24 predecessor in interest, accepted by Plaintiffs and consummated by both parties.
 25 Ocwen's violation of its predecessor's promise forced Plaintiffs into default. And
 26 then Ocwen immediately proceeded to default and foreclosure, refusing to discuss or
 27 negotiate the matter with Plaintiffs. Ocwen negligently and recklessly proceeded to
 28

1 foreclosure in violation of a binding and valid loan modification agreement that
 2 Plaintiffs had negotiated with Ocwen's predecessor, Litton, and made payments
 3 thereto. FAC ¶¶ 42-43.

4 Therefore, Plaintiffs' First Amended Complaint did state a claim for wrongful
 5 foreclosure.

6 **E. PLAINTIFFS ALLEGED SUFFICIENT FACTS TO STATE A CAUSE**
 7 **OF ACTION FOR VIOLATION OF 15 USC §1641(G)**

8 Defendants' current Motion to Dismiss states that an assignment of Deed of
 9 Trust to HSBC Bank was recorded on or around January 19, 2012, after the Loan was
 10 in default. When a person or entity purchases a mortgage loan, the purchaser is
 11 required to give written notice to the borrower within 30-days and failure to do so
 12 subjects an offending party to statutory penalties and attorney fees. 15 USC §1641g.
 13 Defendants never notified Plaintiffs of this transfer according to 15 U.S.C. 1641(g).
 14 FAC ¶ 20. The statute of limitations for bringing an action for violation of 15 U.S.C.
 15 § 1641(g) is one year. Here, Plaintiffs did file this action within that period.
 16 Defendants also seem to take issue with Plaintiffs' ability to prove any damages
 17 stemming from any Section 1641(g) violation. However, Plaintiffs also seek statutory
 18 damages. Complaint ¶¶ 60, 113.

19 Finally, Defendants seem to argue that Section 1641(g) applies only to
 20 creditors, and that HSBC Bank is not a creditor. Defendants have not explained how
 21 the Court can reach that conclusion based on the First Amended Complaint alone. In
 22 addition, at least one district court within this Circuit has commented that the
 23 definition of "creditor" for purposes of Section 1641(g) may be broader than the
 24 definition of creditor sued elsewhere in the Truth in Lending Act. *See Vargas v.*
 25 *HSBC Bank USA, N.A.*, No. 11-cv-2729 BEN (RBB), 2012 U.S. Dist. LEXIS 128661,
 26 *8n.4 (S.D. Cal. Sept. 10, 2012).

1 For all these reasons, the Court should deny Defendants' Motion to Dismiss
2 Plaintiff's Section 1641(g) claim.

3 **IV. CONCLUSION**

4 Plaintiffs' Complaint is well-pled and allows the Court to infer more than the
5 mere possibility that Plaintiffs are entitled to relief; in fact, when the Court accepts
6 the factual allegations as true the Court can make a "reasonable inference" that
7 Defendants have engaged in misconduct for which they may be liable.

8 To the extent the Court dismisses any claim or allegation, Plaintiffs request the
9 opportunity to amend their pleading to cure any deficiency, add additional causes of
10 action or rename any causes of action.

11
12 DATED: August 05, 2013

THE ALBERTS FIRM

13
14
15 By: /Batkhand Zoljargal/
16 Jeremy J. Alberts
17 Batkhand Zoljargal,
18 Attorneys for Plaintiff,
19 Robert Burns and Kristen Burns
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